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NO. 71-730

IN THE

Supreme Court of the United States

October Term, 1971

JAMES W. WILLIAMS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James W. Williams, Petitioner, prays that a writ of certiorari issue to review the judgments and three opinions of the United States Court of Appeals for the Fifth Circuit rendered in this proceeding on March 26, 1970, September 16, 1970 and September 16, 1971.

OPINIONS OF THE COURT BELOW

The Court of Appeals wrote three opinions. The original opinion, rendered March 26, 1970, is reported in 424 F.2d 344. The second opinion, on petitions for rehearing by both Williams and the Government, rendered

September 16, 1970, is reported in 431 F.2d 1168. The third opinion, on rehearing by the court *en banc*, rendered September 16, 1971, is reported in 447 F.2d 1285.

True copies of the opinions, are appended in chronological order as Appendages A, B and C, Pages 21 to 66.

GROUNDS OF JURISDICTION

The original opinion and judgment were entered on March 26, 1970. Williams filed a Petition for Rehearing on April 8, 1970. The Government, on April 9, 1970, filed motion for a 30-day extension for filing Petition for Rehearing; this was granted on April 16, 1970. The Government, on May 8, 1970, filed a second motion for an additional 16-day extension for filing Petition for Rehearing; this was granted May 20, 1970. Thereupon the Government filed its Petition for Rehearing on May 23, 1970.

Both Williams and the Government timely filed Suggestions for Rehearing *en banc*. Thereafter, on September 16, 1970, the original panel of the court, with written opinion, denied both Williams' and the Government's Petitions for Rehearing. However, on the same date a majority of the judges in active service ordered Rehearing *en banc* and supplemental briefing.

One year later, on September 16, 1971, the Court *en banc*, with written opinion, entered its judgment affirming the judgments of conviction. To this *en banc* ruling, Williams filed Petition for Rehearing on September 24, 1971. This was denied November 4, 1971. (See Appendages D and E, Pgs. 67 to 69, infra.

Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. A Government expert witness extrajudicially examined business books and records identified by hearsay only, not authenticated by their custodians under the *Business Records Statute*, 28 U.S.C. 1732(a), and not produced in court for use by Petitioner in cross-examining the expert witness. Questions presented:

A. Whether the confrontation clause of the Sixth Amendment prohibits the expert's opinion evidence based on the entries in these business books and records?

B. Whether the Sixth Amendment guarantees to Petitioner the rights of confrontation by and cross-examination of the custodians of the business books and records?

II. A. Whether the "twice put in jeopardy" clause of the Sixth Amendment prohibits successive prosecutions based on the same transactions and overlapping allegations and evidence?

B. Whether under the Sixth Amendment the general Federal policy recited and approved in *Petite v. United States*, 361 U.S. 529, 80 S.Ct. 450, that several offenses arising out of the same transactions should be alleged and tried together and not made the basis of multiple prosecutions, must be applied equally to all defendants charged with Federal crimes?

III. Contemporaneously with grand jury deliberations the Securities and Exchange Commission and a Trustee in Reorganization intentionally and purposefully instituted and conducted in a Federal courtroom a Public Inquiry, during which some 72 witnesses were publicly examined. Though Petitioner bore the status of an accused in the proceedings, the Trustee publicly endeavored to force Petitioner to testify, and publicly commented on his refusal, but expressly denied him the right to be represented by counsel and to cross-examine, rebut and defend. The questions presented are:

A. Whether these public proceedings denied Petitioner due process of law as guaranteed by Amendment Five to the Constitution of the United States?

B. Whether these public proceedings denied Petitioner traditional grand jury procedures within the concept of the right to indictment of a grand jury as guaranteed by Amendment Five to the Constitution of the United States?

C. Whether the traditional rule requiring secrecy of grand jury proceedings has as one of its purposes the protection of the accused against pre-indictment public examination of Government witnesses in a proceeding in which the accused is denied the right to be represented by counsel and to cross-examine, rebut and defend?

D. Whether the Trustee's publicly forcing Petitioner to refuse to testify and publicly commenting on the refusal denied Petitioner due process of law

as guaranteed by Amendment Five to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *"

Sixth Amendment to the Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

28 U.S.C. 1732. Record made in regular course of business.

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowl-

edge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

STATEMENT OF THE CASE

The judgment of the Court of Appeals is on a consolidated appeal from two convictions based on the facts resulting in the collapse of Westec Corporation in Houston, Harris County, Texas. Williams is the former Chairman of the Board of said corporation. The first conviction was under 18 U.S.C. 371, 1001, and 1341 and under 15 U.S.C. 77e(a) and 78ff(a). The second conviction was under 15 U.S.C. 78i(a)(1) and (2).

During the trial of the first prosecution (No. 26,829 below) the Government produced the witness Thomas Jeffrey to testify as an expert on the material issue of the valuations of oil and gas properties sold by Westec Corporation. He based his opinion on his extrajudicial examination and analysis of the entries in purported business books and records of these vendees. Jeffrey was told by persons who did not testify that these were books and records of vendees of Westec Corporation but he was not told they were the correct records. (Appx. IV, 1257). Such books and records were not produced in Court nor made available to the defense for use in cross-examination of Jeffrey.

The Government did not produce the custodians of the books and records to identify and authenticate them. It wholly failed to comply with the requirements of the *Business Records Statute,* 28 U.S.C. 1732 (a) (Appx. IV, 1233-1250). Jeffrey was not a custodian of the books and records, made none of the entries therein, and affirma-

tively testified that his knowledge as to the identity and authenticity of the books and records was based on what others had told him, and that he could not vouch for their identity or accuracy. (Appx. IV, 1251-1257).

The Government made no showing to excuse its not producing the books and records, their custodians, and those persons who made the hearsay statements to Jeffrey. It showed no excuse for non-compliance with the *Business Records Statute*. (Appx. IV, 1250-1257). These books and records were of corporations owned and controlled by Fred L. Hall, also under Federal indictment. He is a brother of Ernest M. Hall, a Government chief witness against Williams. Less than two months after Williams' conviction, the charges against Fred L. Hall were dismissed on motion of the Government. (Appx. I, 2, 4, 13-23, V, 1698-1699).

Williams objected on the basis of non-compliance with the *Business Records Statute*, hearsay, denial of the Constitutional guaranty of confrontation by, and cross-examination of, the custodians of the records, and the failure of the Government to produce and authenticate the records for his cross-examination of Jeffrey. (Appx. IV, 1241-1250, 1257).

After verdict in the first prosecution (No. 26,829 below) the Government prosecuted and convicted a second time (No. 26,830 below). It could have included the charges of the second prosecution as a separate count in the prior indictment, for all the charges in both prosecutions arose from the affairs of Westec Corporation and its debacle. Both prosecutions involved overlapping allegations and evidence on Williams' and others' allegedly inducing the public to purchase and retain shares of com-

mon stock of Westec Corporation (Appx. I, 16 and 24). In bar of the second prosecution Williams plead immunity from being twice put in jeopardy, *res judicata,* immunity from successive prosecutions, and carving and election of prosecutions by the Government. (Appx. I, 58-61).

Eight months before Williams' indictment the Trustee in Reorganization of Westec Corporation, and the Securities and Exchange Commission, began a public hearing (alleged to be a "Court of Inquiry"*) under Sections 21(a) and 167 of the *Bankruptcy Act,* 11 U.S.C. §§44 and 567. It continued for approximately eleven months, encompassing the Grand Jury deliberations. Most of the time this public hearing was conducted in a United States Courtroom in Houston, Texas. (Appx. I, 63, 69-70, 73, 154-155).

During the public "Court of Inquiry" some seventy-two (72) witnesses were publicly examined. Their evidence produced some eight thousand, seven hundred and thirty-six (8,736) pages of testimony and a myriad of 200,000 exhibits. (Appx. I, 155, 161, 350-351). Great quantities of the proof were adverse to Williams and tended to incriminate him unless rebutted and tested and qualified by cross-examination. The proceedings necessarily generated massive and widespread publicity injurious to him.

At all times during the public "Court of Inquiry" Williams bore the status of an accused. The attorney for the Trustee publicly castigated Williams, and publicly endeavored to call Williams to publicly testify, thus forcing Williams to publicly claim Fifth Amendment immunity. (Williams Pre-trial Ex. 14, p. 9-19).

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*A descriptive phrase used by Williams in the courts below.

Williams made repeated requests and motions for the rights to cross-examine, rebut and defend. These were repeatedly affirmatively denied. Alternative motions that if he was to be denied these rights the proceedings be held in a closed private hearing were denied. (Appx. I, 63-68).

The *Rules of the Securities and Exchange Commission Relating to Investigations,* Rule 7 (d) provided for allowing cross-examination and rebuttal evidence to persons similarly situated to Williams. (Appx. I, 73-74, 78, 17 C.F.R. 203.7(d).). However, the S.E.C. attorney joined with the Trustee in denying these rights to Williams. (Appx. I, 67-68). This attorney could identify only one previous time of such a public S.E.C. hearing with denial of these rights, in the year 1935. (Appx. I, 350). He admitted the hearings could have been conducted privately. (Appx. I, 350).

Williams raised the issue by several motions prior to and during the "Court of Inquiry" and by pleas in bar to both prosecutions. (Appx. I, 40-49, 63-78).

REASONS FOR GRANTING THE WRIT

I.

THE CONFRONTATION ISSUE

Because of the Government's wide and increasing use of expert testimony in criminal prosecutions, it is of major Constitutional importance to the administration of criminal justice that this Court determine whether the confrontation guaranty of the Sixth Amendment prohibits opinion testimony by an expert witness based on hearsay. That the Court of Appeals wrote three opinions, with conflicting conclusions, supports this contention.

Williams was denied confrontation and cross-examination of the custodians of the books and records which the expert witness Jeffrey examined extra judicially and on which he based his opinion. These records were neither produced in court nor identified in court, nor authenticated under the *Business Records Statute* 28 U.S.C. 1732(a). The minority opinion below held this to be error in the light of *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, and other opinions by the Supreme Court. (Appendage B, see also Appendage A). The majority opinion below interpreted *California v. Green* to create an exception as to expert testimony and to allow an expert opinion to be based on hearsay. (Appendage C). Consequently, this Supreme Court should decree the bearing of *California v. Green* on opinion evidence based on hearsay.

In *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, this Court held that the foundation for a physician's expert opinion could not be established by hearsay. The majority decision below by the Court of Appeals departs from and conflicts with *Hopt.* It conflicts also with the confrontation concepts decreed in *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318; *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065; *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074; and *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926.

There was no proof that entries in the books and records examined by Jeffrey were made in the regular course of business nor that it was the regular course of business to make such entries. Consequently, the books and records were not authenticated as required by the *Business Records Statute,* 28 U.S.C. 1732(a). The result is that the majority opinion below conflicts with *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, which interpreted

the statute (then 28 U.S.C. 695). The necessary intent of the statute and the inherent holding in *Palmer v. Hoffman* is that the custodians of the books and records must be subjected to confrontation and cross-examination on these regular course of business issues.

Prior to the decision below, the Fifth Circuit itself had consistently held that expert opinions could not be based on hearsay and that when an opinion was based on books and records prepared by others the books and records must be produced, identified, and authenticated in court by the custodians of the records. *Paschal v. United States* (5th Cir.), 306 F.2d 398; *Greenhill v. United States* (5th Cir.), 298 F.2d 405; *Cooper v. United States* (5th Cir.), 91 F.2d 195; *Kolbrenner v. United States* (5th Cir.), 11 F.2d 754. Its final ruling *en banc* conflicts with its own many precedents.

The majority opinion below conflicts with many holdings of other Courts of Appeal that books and records on which opinion evidence is based must be produced, identified and authenticated in court. *Cooper v. United States* (8th Cir.), 9 F.2d 216, 213; *United States v. Michener* (3rd Cir.), 152 F.2d 880; *Greenberg v. United States* (1st Cir.), 280 F.2d 477; *Greenberg v. United States* (1st Cir.), 295 F.2d 903; also *United States v. Campanaro* (D. C. Pa.), 63 F.Supp. 811. It is important that this Court reconcile this conflict of opinion between the Circuits.

The custodians of the records on which the expert witness Jeffrey relied were not subjected to the demeanor tests decreed in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318 and *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930. Consequently, the majority ruling below decrees an

exception to the demeanor doctrine as to expert testimony that has not yet been authorized by this Supreme Court, and which exception conflicts with *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, which prohibited use of documents not tested by confrontation by the maker of the documents. The existence or no of such an exception is a major Constitutional issue needing the consideration and decision of this Supreme Court, for it affects the fundamental rights of Williams and others similarly situated.

Denial to Williams of the right to be confronted by and to cross-examine the custodians of the records, to have the records identified and authenticated under the *Business Records Statute,* 28 U.S.C. 1732 (a), and to have the records available for cross-examination of the expert witness Jeffrey is "Constitutional error of the first magnitude". *Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748; *Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245; *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065. Error of such magnitude should not be allowed to stand. It affects not only Williams, but also those now, and in the future to be, similarly situated.

II.

SUCCESSIVE PROSECUTIONS AND *RES JUDICATA*

The charges against Williams in the second prosecution could have been included as an additional count of the indictment on which he was first tried. He then would have been burdened with only one defense. The District Court would have been burdened with only one trial. Both Williams and the Government would have had less expense and legal labor.

Successive prosecutions based on the same acts not only harass and overburden the Defendant; they additionally unnecessarily clog court calendars, senselessly deplete revenues allocated to administration of criminal justice, and make for inefficient and disorderly law enforcement. See *Petite v. United States,* 361 U.S. 529, 80 S.Ct. 450, and *Marakar v. United States,* 370 U.S. 723, 82 S.Ct. 1573, which are further treated, *infra,* p. 14

Injustice to a Defendant of harassment by successive prosecutions was elaborately treated by Mr. Justice Brennan in his separate opinion in *Abbate v. United States,* 359 U.S. 187, 196-201, 79 S.Ct. 666, 671-674. Its potential violation of due process was commented on by Mr. Justice Frankfurter in *Bartkus v. Illinois,* 359 U.S. 121, 127, 79 S.Ct. 676, 680: ". . . at some point the cruelty of harassment by multiple prosecutions by a state would offend due process." The majority of this Court has heretofore decreed that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual—compelling him to live in a continuing state of anxiety and insecurity. . . ." *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221.

Mr. Chief Justice Burger's opinion in *Price v. Georgia,* 398 U.S. 323, 90 S.Ct. 1757, expressly decrees that "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." See also *Ball v. United States,* 163 U.S. 662, 669, 16 S.Ct. 1192, 1194.

This Court has consistently dismissed, on motion of the Government, second convictions on the same transaction on the "general policy of the Federal Government 'that

several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by consideration both of fairness to defendants and of efficient and orderly law enforcement'." *Petite v. United States,* 361 U.S. 52, 80 S.Ct. 450; *Marakar v. United States,* 370 U.S. 723, 82 S.Ct. 1573. Similar dismissals have been entered by Circuit and District Courts. *Orlando v. United States* (9th Cir.) 387 F.2d 348; *United States v. American Honda Motor Company* (D.C.N.D. Calif.) 271 F.Supp. 979, 988; *United States v. American Honda Motor Company* (D.C.N.D. Ill.) 273 F.Supp. 810. The time is ripe for this Court to decree as law this "general policy" of the Federal Government. The rights of Defendants and the need of the public for efficient and orderly law enforcement should be the rule of this Supreme Court and not left to the discretion of the Department of Justice.

The Government's failure and refusal to apply this "general policy" to Williams is "invidious discrimination" against him and denies him equal justice under law, the equal protection of law. In *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, this Court clearly stated the Constitutional goal of uniform justice: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court'." Constitutionally, the Department of Justice should not be allowed to discriminate as to the application or no of "a policy dictated by consideration both of fairness to defendants and of efficient and orderly law enforcement." *Petite v. United States,* supra.

As both prosecutions against Williams arise from the same acts, contain overlapping charges and must be sustained by overlapping evidence, the defense of *res judicata* included in the Fifth Amendment guaranty against double jeopardy, bars the second prosecution. *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237. See also *Ex Parte Snow,* 120 U.S. 274, 7 S.Ct. 556; *Ex Parte Nielsen,* 131 U.S. 176, 9 S.Ct. 672; *United States v. Oppenheimer,* 242 U.S. 85, 37 S.Ct. 68; and *United States v. Adams,* 281 U.S. 202, 50 S.Ct. 269.

III.

THE PUBLIC COURT OF INQUIRY

The Trustee's and S.E.C.'s public examination of the Government witnesses in a Federal courtroom, with Williams bearing the status of an accused, but his being denied the right to be represented by counsel and to cross-examine, rebut and defend, raises serious Constitutional issues. *McClelland v. Texas,* 382 U.S. 928, 86 S.Ct. 307 ("It is clear that grave Constitutional questions are raised by conducting such a proceeding.")

There is the question of whether this "Court of Inquiry" in a very *real* sense was Williams' trial, whether any subsequent trial could be but a hollow formality. *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417. See also *Estes v. Texas,* 381 U.S. 352, 85 S.Ct. 1628 and *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507. Included is the question of whether the Trustee's calling Williams to testify, publicly forcing him to refuse to testify, and publicly commenting on his refusal is a flagrant violation of the holding that the Government cannot comment on the failure or refusal of a Defendant to testify. *Chapman*

v. California, 386 U.S. 18, 87 S.Ct. 824; *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229. The Trustee in Reorganization was a public officer, an officer of the Court. *Callaghan v. Reconstruction Finance Corporation,* 297 U.S. 464, 56 S.Ct. 519, 521.

Related is the question of whether the public "Court of Inquiry" in a Federal courtroom, in which Williams was denied the right to defend was a use of the inquisitorial system of justice forbidden by the Fifth Amendment, which requires the accusatorial process. *Malloy v. Hogan,* 378 U.S. 1, 7, 84 S.Ct. 1489, 1493; *Rogers v. Richmond,* 356 U.S. 534, 541, 81 S.Ct. 735, 739.

Presented also is the question of whether under the circumstances the "Court of Inquiry" was a pre-trial proceeding in which Williams was guaranteed and entitled to procedural due process under the holdings in *Jenkins v. McKeithen,* 395 U.S. 411, 89 S.Ct. 1843; *White v. Maryland,* 373 U.S. 59, 83 S.Ct. 1050, and *Hamilton v. Alabama,* 368 U.S. 52, 82 S.Ct. 157. Bearing on this question is whether the holding of *Greene v. McElroy,* 360 U.S. 474, 79 S.Ct. 1400, or *Hannah v. Larche,* 363 U.S. 420, 80 S.Ct. 1502, controls on the proceeding conducted. See also *Anonymous Nos. 6 & 7 v. Baker,* 360 U.S. 287, 79 S.Ct. 1157 and *In Re Groban,* 352 U.S. 330, 77 S.Ct. 510.

Of great magnitude is whether public examination of the Government witnesses without granting the right to defend infringes on the guaranty of indictment by a Grand Jury. See *McClelland v. Texas,* 382 U.S. 928, 86 S.Ct. 307. Basic Anglo-American tradition is that the Government witnesses be examined in private. See *Shaftesbury's Case,* State Trials, 33 Charles II (1681) wherein

a Grand Jury refused to indict the Earl of Shaftesbury because King's counsel insisted on its hearing the evidence in public. (". . . it is desired by the King's counsel that the evidence may be publicly given . . . it is the opinion of the jury that they ought to examine the witnesses in private, and it has been the constant practice of our ancestors and predecessors to do it.").

This latter question was squarely presented to the Supreme Court of North Carolina in *State v. Branch*, 68 N.C. 186 (2nd Ed. 68 N.C. 133). It quashed the indictment clearly stating the rationale as follows:

> ". . . *the protection of a grand jury amounts to nothing if the citizen is to be first exposed to scandal and disgrace by a public examination of the witnesses on the part of the State* . . . if upon the public examination of the witnesses for the State, he has no right to cross-examine and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, *it would be better for him to have a trial at once, upon information, where he has the right to confront the accusers and witnesses with other testimony and to have counsel for his defenses, instead of being, in the first place, put in the condition of a victim tied to "a stake", while his reputation is being tortured to death.* If the witnesses for the State are to be examined in "public", upon the inquiry of the grand jury, in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit of counsel.
>
> *"Why examine the witness for the State in public without the right of cross-examination and of confronting the witnesses, unless it be to expose the accused to scandal and disgrace, else to browbeat the*

grand jury and influence 'the finding' not in respect to the case but in respect to the fact?" (Emphasis added)

The record shows that the public "Court of Inquiry" encompassed the grand jury proceedings as to Williams. Consequently, this petition squarely presents the question of whether the "Court of Inquiry" violated the high Federal standards for secrecy in grand jury proceedings. This Court should take and determine the issue, for it has consistently placed great sanctity on protection of citizens by the guaranty of indictment by grand jury. *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038; *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270; *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781.

These "grave Constitutional questions" (*McClelland v. Texas,* supra) involve flagrant breaches of due process. It is therefore respectfully suggested that this Court should take this petition "for the preservation of the purity of its own temple" to sustain "the imperative of judicial integrity", to avoid "making the Courts themselves accomplices in wilful disobedience of law", for "The Court protects itself." *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 565 (Dissents of Messrs. Justices Holmes and Brandeis); *Sorrells v. United States,* 287 U.S. 435, 53 S.Ct. 210 (Mr. Justice Roberts); *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608; (Mr. Justice Frankfurter); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (Mr. Justice Clark).

CONCLUSION AND PRAYER

On the facts and authorities submitted, it is urged that this Petition for Certiorari presents substantial Consti-

tutional questions for consideration by this Honorable Supreme Court of the United States and that these questions should be resolved to the relief of the Petitioner and others similarly situated.

WHEREFORE, Petitioner prays that this Petition for Certiorari be granted to correct the errors of the Honorable Court of Appeals for the Fifth Circuit and of the Honorable United States District Court for the Southern District of Texas.

Respectfully submitted,

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APPENDAGE A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26829 and 26830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES W. WILLIAMS,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

(March 26, 1970)

Before RIVES, GOLDBERG and GODBOLD, Circuit Judges.

RIVES, Circuit Judge: James W. Williams appeals from two judgments of conviction in closely related criminal cases. Williams was formerly Chairman of the Board of Westec,[1] and both criminal prosecutions were precipitated by the financial collapse of Westec which resulted in suspension of its stock from trading on the American Stock Exchange on August 26, 1966, and one month later in an order appointing a trustee of Westec in reorganization proceedings in the Southern District of Texas.

1. Western Equities, Inc., until May 1966, then renamed Westec Corporation—for convenience called Westec in this opinion.

Case No. 107[2] was commenced by Grand Jury indictment and was tried to a jury for nearly a month, from June 17 to July 11, 1968, resulting in a verdict and judgment of guilty on thirteen counts, and in sentence to be served of ten years' imprisonment.

Case No. 233[3] was commenced by criminal information filed by the United States Attorney on September 12, 1968 (two months after the jury's verdict in Case No. 107). The information contained only one count, and was tried to the court without a jury on a stipulation of facts,[4] resulting in a judgment of conviction and a sentence to be served of an additional five years' imprisonment, or a total of fifteen years.

In Case No. 107, Count One charged Williams with conspiracy with three co-defendants to violate 15 U.S.C. 77e(a), 78ff(a) and 18 U.S.C. 1001 and 1341; the other twelve counts of which the Jury found Williams guilty charged substantive violations of the mail fraud statute, 18 U.S.C. 1341. In Case No. 233, the one count criminal information alleged a conspiracy in violation of 18 U.S.C. 371 by Williams and others to manipulate unlawfully the price of the common stock of Westec in violation of 15 U.S.C. 78i(a) (1) (2).

By various challenges, claimed defenses, and objections to the indictment and to the information, objections to the evidence, and a requested instruction to the jury,

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2. Case numbered 26,829 in this Court, 68-H-107 in the district court, for convenience referred to in this opinion as Case No. 107.

3. Case numbered 26,830 in this Court, 68-H-233 in the district court, for convenience referred to in this opinion as Case No. 233.

4. We are informed that this procedure was adopted to preserve issues of law.—See Martin v. United States, 5 Cir. 1968, 389 F.2d 895.

Williams preserved seven issues for review on appeal, which we will consider in the order in which they are briefed by the parties.

1. Denial of Confrontation by Non-Production of Records.

Out of its logical, or chronological order, Williams presents as his first issue on appeal that he was denied his Sixth Amendment guaranty of confrontation when, over his objection, an expert witness was allowed to give opinion evidence based on extra-judicial investigation of records not themselves introduced in evidence.

In Case No. 107, each of the thirteen counts of the indictment on which Williams was convicted contained averments as to which evidence was relevant to prove the value of the net future earnings as of January 1, 1967 of certain producing oil and gas properties. In effect, the indictment charged that Westec had sold oil and gas properties to corporations controlled by co-conspirators at prices greater than their fair market value. To support those allegations, the witness Thomas Jeffrey testified as an expert on the valuation of the properties to the following opinions:

> "A. My estimate of the future net earnings of Irving Properties as of 1-1-67 was $500,032.
>
> * * * *
>
> "A. My estimate as of January 1st, 1967, of the future net earnings from Wilcrof, Incorporated, oil and gas properties was $44,469."

No question was raised as to Jeffrey's qualifications as an expert, but Williams repeatedly and strenuously

objected because the records of the two corporations upon which the witness based his opinion were not themselves offered in evidence. As aptly expressed by defense counsel: "* * * a proper predicate has not been laid for such an opinion. They have not produced the records concerning the earnings and the production upon which he is basing his opinion, nor the other supporting data and records that he said he had used in reaching his opinion. That is not in evidence to this date."[5] The able and careful district judge overruled the objection upon the following reasoning:[6]

> "Well, with respect, first, to Jeffrey, that rightly or wrongly does not trouble me because Jeffrey is an expert witness, and while it might have been done differently, in my view all Mr. Jeffrey had to say was that I have studied the question and I have an opinion and that is my opinion. The rest of it is

5. Again at the close of the witness Jeffrey's testimony:

"Q. One other question, and your opinion is based upon these things that other people told you and records that other people showed you and information other people gave you about which I have been interrogating you?

"A. Yes.

"Mr. Smith: If the Court please, at this we move to strike this opinion and his evidence as to the evaluations on the bases that the Government did not lay a proper predicate. His opinions are unquestionably based upon hearsay and that to permit the evidence to go before this jury is a denial to Jim Williams of the right of confrontation guaranteed under the Constitution to see in open court the people who furnish these records and told them these facts.

"And it has been proven here that one of those men in each instance was Mr. Fred Hall, and that to permit this not be stricken from the record is to deny him constitutional right of confrontation and cross examination of the witnesses knowing the facts, to test them as to whether or not it is the truth.

"The Court: Overruled."

6. Stated in a discussion with the attorneys in chambers.

probing to satisfy or testing the validity of his opinion, and whatever is said or done in his investigation is simply a measure of the completeness or validity or accuracy or however you care to put it, of his investigation as related to his opinion on value."

The two appraisals made by the witness Jeffrey were marked as Government Exhibits X-4 and X-5. The issue may be more sharply defined by the proceedings when the Government offered those exhibits in evidence, which proceedings are quoted in the margin.[7]

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7. "Mr. Dimmitt: At this time, Your Honor, the government will offer into evidence Government Exhibits X-4 and X-5.

"Mr. Smith: Your Honor, I want to register an objection to Government's Exhibit X-4 and X-5, that the government has not laid the proper predicate for the admission of these documents into evidence, that they have not proved or produced the documents and records upon which his report, upon which these reports are based, nor any of the logs, production records, drilling records or anything else that he obtained from Wilcrof, Incorporated, or from Irving Petroleum Company, Incorporated, and that for such reason these exhibits would be based on hearsay and evidence to which, or matters to which this defendant has been denied the right of cross examination, and as to matters to which this defendant has, under the Constitution, been denied the right to confront in open court the witnesses who prepared such records and who submitted such records to this man for examination.

"The Court: May I see the documents?

"Sustain the objection to the exhibits. I have admitted the opinion of the witness because he has qualified himself. At least he has answered the questions to the jury as to the extent of his qualifications, which would entitle him to express an opinion. The quality of the opinion is a matter of weight.

"But these documents are not necessary, and might have some hearsay aspects. I will exclude them. The opinion of the witnesses in the record as to the ultimate question.

"Mr. Dimmitt: Recognizing the Court's full cognizance of this, Your Honor, we would limit the offer only to the fact that such an evaluation was performed and not as to the truthfulness of all of the matters contained therein, which may have some hearsay in it, and so limit the government offer.

"The Court: Any comment?

Further, just before excusing the witness Jeffrey subject to recall, the district court developed the fact that the records from which the appraisals were made remained in the witness' possession.[8] The witness was not recalled or requested to produce the records.

Williams' counsel bases his argument squarely on the Sixth Amendment guaranty of confrontation. We do not have the question of whether in a civil case, not affected by that guaranty, the expert's opinion evidence based on the records may have been admissible without prior introduction of the records themselves.[9]

In an eminent domain case this Circuit adopted the position of the Fourth Circuit in *United States v. 5139.5 Acres of Land, etc.*, 200 F.2d 659, 662, that:

"Mr. Smith: We renew our objection, Your Honor, that the government is not entitled to put in this record matters for which they do not vouch for the truth.

"The Court: They may be put in the record and not passed to the jury, just a record of his having made such a report. He has already testified to that."

8. "The Court: Do you have the records assembled by you for the purpose of this evaluation?

"The Witness: Yes.

"The Court: He said he had the records from which the appraisals are made. You may be excused subject to recall. You will be in Dallas, so leave your telephone number.

"(Witness excused.)"

9. The proposed Rules of Evidence for the United States District Courts and Magistrates provides in Rule 7-05:

> "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

The Advisory Committee's Note contains a valuable discussion on the subject as does an article by Professor Green, a distinguished member of the Committee, in *Highlights of the Proposed Federal Rules of Evidence*, 4 Ga.L.Rev. 1, 33, 34 (1969).

> "If the expert has made careful inquiry into the facts, he should be allowed to give them as the basis of the opinion he has expressed. If he had not made careful inquiry, this will be developed on cross examination and will weaken or destroy the value of the opinion. Ordinarily evidence as to facts of this sort given by an expert as the basis of his opinion as to value comes with a sufficient guaranty of trustworthiness to justify the relaxation of the hearsay and best evidence rules."

International Paper Company v. United States, 5 Cir. 1955, 227 F.2d 201, 209.

Likewise, the Tenth Circuit has held that: "The rule is well established that an expert may testify as to value, though his conclusions are based in part, or even entirely, upon hearsay evidence." *H. & H. Supply Co. v. United States*, 10 Cir. 1952, 194 F.2d 553, 556.

The Government cites also *United States v. Alker*, 3 Cir. 1958, 260 F.2d 135, 155, 156, where a criminal tax fraud conviction was affirmed, but in that case the Sixth Amendment confrontation issue was not discussed or decided.

The Supreme Court has long recognized that the right of confrontation "must occasionally give way to considerations of public policy and the neeessities of the case." *Mattox v. United States*, 1895, 156 U.S. 237, 243.

Judge Tuttle for this Court in *Matthews v. United States*, 5 Cir. 1954, 217 F.2d 409, 418, discussed ably the effect of the Sixth Amendment right of confrontation on the admissibility of evidence under exceptions to the hearsay rule, concluding:

> "While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness, it does embody those requirements as essential to all exceptions to the rule, present or future."

See also the very full discussion in 5 Wigmore on Evidence, 3d ed. §1397.

We come to the question of whether the facts and circumstances of this case are such that Williams' right of confrontation must "give way to considerations of public policy and the necessities of the case." *Mattox v. United States, supra.*

The witness Jeffrey testified that all data as to core analyses, well records, operating costs and the price of oil and gas were obtained from the records of the two companies. The witness simply accepted those records as correct and could not testify directly that they actually were correct.

> "Q. Who told you that they were the correct records?
> "A. No one told me they were the correct records.
> "Q. How then do you know they were the correct records?
> "A. I used my own best judgment from the records available as to the correctness of the records."

There was no proof that the records on which the witness relied were made and kept in such fashion as to meet the requirements of the Federal Business Records Act, 28 U.S.C. §1732. We cannot escape the conclusion that Williams was denied his constitutional right to confront and cross-examine the witnesses who prepared and were the custodians of the records on which Jeffrey relied.

As the Supreme Court said in *Pointer v. Texas,* 1965, 380 U.S. 400, 405:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Other recent Supreme Court decisions have emphasized the essential and fundamental importance to a fair trial of the right of confrontation and cross-examination.[10]

The fact that Jeffrey had the records from which the appraisals were made did not impose any duty on Williams to require that the records be brought in. Williams had theretofore repeatedly objected to the witness' testimony as to value until the records on which that testimony admittedly was based had been introduced in evidence. Jeffrey could not testify to the correctness of the records any more than he did, that is, that he used his own best judgment as to their correctness. The burden rested on the Government to prove the authenticity of the records and that burden could not be shifted to the defendant. In this case the defendant repeatedly and consistently insisted on his right to confront and cross-examine the witnesses who might testify as to the correctness of the pertinent records. There was never any indication of waiver of that right. That circumstance distinguishes the present case from *Bruce v. United States,* 5 Cir. 1965, 351 F.2d 318.

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10. Douglas v. Alabama, 1965, 380 U.S. 415; Brookhart v. Janis, 1966, 384 U.S. 1; Barber v. Page, 1968, 390 U.S. 719.

Williams was deprived of his constitutional right to confront and cross-examine the witnesses who might be offered by the Government to authenticate the records of the two companies on which the witness Jeffrey relied in making his value appraisals. For that error the judgment of conviction in Case No. 107 must be reversed.

H. Misuse and Abuse of the Investigative Powers Granted the Trustee in Sections 21(a) and 167 of the Bankruptcy Act, 11 U.S.C. §§ 44 and 567.

Williams terms the bankruptcy examination a public "Court of Inquiry,"[11] which encompassed the period of the Grand Jury deliberations resulting in his indictment and brings into application the rulings of the Supreme Court in *Estes v. Texas,* 1965, 381 U.S. 532, and *Sheppard v. Maxwell,* 1966, 384 U.S. 333, and *Rideau v. Louisiana,* 1963, 373 U.S. 723. We find no real merit in the contention.

The applicable bankruptcy statutes are means of discovering useful information and not of adjudicating guilt. The examinations were necessarily extensive and searching and the hearings were public, and properly so. There was, however, no showing of such undue publicity as would prejudice the Grand Jury in its deliberations, or as might deny Williams his right to a fair trial. We agree with the district court that there was no sufficient proof that the Trustee misused his office for the purpose of precipitating the criminal indictment or for prejudicing Williams' right to a fair and impartial trial. In short, the evidence

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11. See Martin v. Texas, 1965, 382 U.S. 928, 929; Martin v Beto, 5 Cir. 1968, 397 F.2d 741.

simply fails to sustain Williams' contention that the bankruptcy examination wrongfully or improperly prejudiced his constitutional rights. With Case No. 107 being reversed and remanded, the long period intervening after the bankruptcy examination and before any new trial makes it extremely unlikely that Williams' rights will be prejudiced by any publicity connected with those examinations.

III. Successive Prosecutions and Res Judicata.

Williams argues that, since the Government could have proceeded by separate count in No. 107 for the offense charged in No. 233, his prosecution in No. 233 after he had been found guilty in No. 107 amounted to harassment. He urges that one or more of his short special pleas in bar to No. 233[12] should have been sustained.

The claim of conspiracy to defraud by means of false and fraudulent statements and the mail frauds of which Williams was convicted in No. 107 were different from the conspiracy to unlawfully manipulate the price of the Westec stock charged in No. 233, and different evidence was required to prove guilt. We can find no harassment, unlawful splitting of conspiracies,[13] former jeopardy, res judicata, or other special defense in bar of the prosecution of No. 233.

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12. "1. The plea of former jeopardy.
"2. The plea of res judicata.
"3. The plea of Governmental election.
"4. The plea of Governmental carving.
"5. The plea against splitting of conspiracies.
"6. The plea against successive prosecutions.

13. *See* Powe v. United States, 5 Cir. 1926, 11 F.2d 598.

IV. Multiplicity of Conspiracies

Count One of Case No. 107 charged a conspiracy, and that it was a part of the conspiracy, *inter alia,* to make use of the mails to sell securities, "to carry and cause to be carried through the mails" securities, and to devise a scheme and artifice to defraud by use of the mails, and that among the means by which the defendants would and did carry out the conspiracy was the use of the mails in furtherance of a scheme and artifice to defraud. The other twelve counts in Case No. 107 also charged that the defendants devised a scheme and artifice to defraud, and the final paragraph of each of said counts charged a separate particularized use of the mails for the purpose of executing the aforesaid scheme and artifice to defraud. The distinction between the conspiracy count and the twelve substantive counts is made clear by the discussion in *Isaacs v. United States,* 8 Cir. 1962, 301 F.2d 706, 725.

> "The substantive offenses proscribed by Title 18 U.S.C.A. §§ 1341 and 1343 (mail fraud and fraud by wire) are closely related to a conspiracy, proscribed by Title 18 U.S.C.A. § 371. The distinguishing feature is that the former may be conceived by one person, and the mails or wire must be used for purpose of executing the scheme, while a conspiracy requires an agreement of two or more to violate the law, and at least one overt act in furtherance of the conspiracy."

As the Supreme Court said in *Callanan v. United States,* 1961, 364 U.S. 587, 593:

> "The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law. 'It has been long and consistently recognized by the

> Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.' *Pinkerton v. United States,* 328 U.S. 640, 643. See also *Pereira v. United States,* 347 U.S. 1, 11."

Williams could be convicted under Count One, the conspiracy count, only by proving an agreement, express or implied, between himself and one or more of his co-conspirators to commit the unlawful act and proof was not necessary that that act was ever actually committed. As to the twelve substantive counts, the situation is reversed. An agreement between Williams and one or more of his co-defendants need not be proved, but proof is essential that Williams actually committed the unlawful act.

The indictment in No. 107 charges only one conspiracy and not multiple conspiracies as in *Powe v. United States,* 5 Cir. 1926, 11 F.2d 598.

Williams next argues that the twelve substantive counts, though formally asserted under the mail fraud statute, 18 U.S.C. § 1341, in fact charged the offense proscribed in 15 U.S.C. § 77e(a), which reads:

> "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> "(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> "(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

That statute, unlike section 77q(a), clearly makes each mailing the gist of the crime.[14] Likewise, each mailing in violation of the mail fraud statute, 18 U.S.C. § 1341, is a separate offense.[15] The penalties for the offenses are similar,[16] and the sentence in this case was within the range permitted by either. We need not decide whether the offense charged in the twelve substantive counts in Case No. 107 should have been laid under the Securities Act, 15 U.S.C. § 77e(a) or under the Mail Fraud Statute, 18 U.S.C. § 1341, for any error in that regard is not so material as to be ground for reversal of the conviction. Rule 7(c), Fed. R. Crim. P.

V. Improper Venue.

Williams insists that if the charges in the twelve counts which purport to charge substantive violations of the mail fraud statute had been brought independently of that statute, constitutional venue would lie in the District of Columbia where the documents were filed. He relies for that insistence on tax evasion cases.[17] In those cases, however, the offense was not complete until the false statements were filed. Congress "so carefully indicated the *locus* of the crime." *Travis, supra,* 364 U.S. at 636. The language of 15 U.S.C. § 77e(a), which has been heretofore quoted, is entirely different — "to carry or cause to be carried through the mails, etc." That language, to

14. United States v. Hughes, S.D.N.Y. 1961, 195 F.Supp. 795, 799; United States v. Allen, S.D.N.Y. 1961, 28 F.R.D. 329.

15. Badders v. United States, 1916, 240 U.S. 391, 394.

16. Compare 18 U.S.C. § 1341 with 15 U.S.C. § 774.

17. Sansone v. United States, 1965, 380 U.S. 343, 354, 85 S.Ct. 1004, 1011; Travis v. United States, 1961, 364 U.S. 631, 81 S.Ct. 358; United States v. Lombardo, 1916, 241 U.S. 73, 36 S.Ct. 508.

our minds, more nearly comports with the wording of the mail fraud statute, 18 U.S.C. § 1341, and accurately defines a crime which can be committed wherever the mailing occurs.

As to the conspiracy count, venue lies where the agreement was made or where an overt act was performed.[18]

VI. Vagueness in the Indictment.

This objection does not warrant extended discussion. Clearly, we think the indictment sufficiently apprised the defendant of what he must be prepared to meet and enabled him, in case of future prosecution, to plead with accuracy the defense of former acquittal or conviction. *United States v. DeBrow*, 1953, 346 U.S. 374, 376.

VII. Refusal of Instruction.

The district court refused Williams' request to charge the jury as follows:

> "The law required that Westec Corporation file with the Securities and Exchange Commission and that Westec Corporation send through the mails or other modes of transportation in interstate commerce various reports and documents such as annual reports, semi-annual reports, and quarterly reports. You are instructed therefore, that you cannot convict the Defendant, James W. Williams, for doing, or causing to be done, as an officer of Westec Corporation, merely that which the law required him to do."

The authority relied on for that instruction is *Parr v. United States*, 1960, 363 U.S. 370, 390-392. The legally

18. Bellard v. United States, 5 Cir. 1966, 356 F.2d 437, 438; Miller v. Connally, 5 Cir. 1965, 354 F.2d 206, 208.

compelled mailing in *Parr* were mailings of valid and correct tax assessments, not of false documents.

The substantive counts in Case No. 107 charge that it was part of the scheme and artifice to defraud that the defendants would mail to the Securities and Exchange Commission, American Stock Exchange, financial institutions, brokerage companies, and the shareholders and prospective shareholders of Westec the annual, semi-annual and quarterly reports of Westec, which reports contained false, fraudulent and misleading statements and representations concerning the operating results of Westec and financial condition of Westec.

The indictment then takes up the several reports and describes the alleged omissions and false statements in each report. Certainly the *Parr* decision cannot have the effect of according immunity to any person for filing false reports merely because the law requires reports to be filed. The requested instruction might well have conveyed such a meaning to the jury. To say the least, it was highly misleading. The district court properly refused the instruction.

In case numbered 26,829 in this Court the judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. In case numbered 26,830 in this Court the judgment is affirmed.

Case No. 26,829 — REVERSED AND REMANDED.

Case No. 26,830 AFFIRMED.

APPENDAGE B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26829 and 26830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES W. WILLIAMS,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

(September 16, 1970)

ON PETITIONS FOR REHEARING

Before RIVES, GOLDBERG and GODBOLD, Circuit Judges.

PER CURIAM: The Government petitions for rehearing in Case No. 26829, and Williams petitions for rehearing in Case No. 26830. We consider the petitions separately and deny them both.

No. 26829

We reversed the judgment of conviction in No. 26829[1] because the admission of certain testimony of the witness Jeffrey denied Williams the right of confrontation guaranteed by the Sixth Amendment to the Constitution. On petition for rehearing en banc the Government makes two contentions: (I) It forthrightly challenges that holding; and (II) it contends that the admission of Jeffrey's testimony, if error, does not call for reversal as to counts of the indictment other than counts nine, ten and eleven.

I. The Admission of Jeffrey's Testimony.

Over explicit and repeated objections of the defendant Williams, the Government was permitted to prove by its expert witness Jeffrey his estimates of the net future earnings, as of January 1, 1967, of two producing oil and gas properties, the Irving properties and the Wilcrof properties, when the records upon which Jeffrey based those estimates were not proved to be correct or even authenticated as the records of the two companies, and were never introduced in evidence.

Irving Petroleum Investment, Inc. and Wilcrof, Inc. were corporations controlled by defendant Ernest M. Hall, Jr. and his brother, Enid L. Hall. As to each of the properties, the indictment charged that the price paid was materially greater than the fair market value of the property. Jeffrey's estimates went to prove those allegations.

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1. Referred to in our original opinion as Case No. 107, see footnote 2 to original opinion.

Jeffrey had testified that to estimate the fair market value of producing oil and gas properties "the important thing is to determine the future reserve and net income of the property."[2] He then described the steps he took in making an appraisal of the two properties:

> "The first step, of course, is to gather all the information that is available on the property, the map or maps of the leases, any records as to the drilling and completion of the well, electrical logs which are electrical surveys made in the hole showing the characteristics of the formations in which the hole is drilled, core analysis, which are analysis [sic] of samples of the rock which are obtained in the drilling of the wells, past production history of oil or gas, bottom hole pressure, which is the actual pressure of the fluid in the reservoir of rock and any other data which would be of benefit in determining the extent of the reservoir and the nature of the reservoir.
>
> "Then, after this basic data is obtained, the maps are prepared showing the structural contours of the reservoirs, the position of gas or gas caps or water tables. This is the elevation of the water below the oil or gas because the oil and gas will float on the water.
>
> "The thickness of the reservoir rock, which contains hydrocarbons to determine the perosity, the void space in the rock, which is present to contain hydrocarbons, the amounts which contain gas and the amount which contains water, and the amount which contains oil.
>
> "And, after determining all those factors, calculations are made of the volume of the reservoir and the amount of oil and gas present and the amount of recoverable oil and gas in the reservoir.

2. Appendix, Vol. IV, p. 1234.

"Other methods of appraisal are used if there is sufficient production history so that the established production of the trend is noticeable.

"For instance, if a well has been producing for a number of years and has shown a consistent decline in production, then it is possible to extract that to an economic limit and determine the reserves. That is when the operating expenses exceeded the income, at which time the production is no longer possible.

"After determining the reserves, records of performance are examined to determine what the operating cost of these properties have been, and what the selling price of the oil is and what the selling price of the gas is, and then economic projections of future income are prepared, using estimates [sic] rates of production by year with the selling price of oil and gas per barrel or per thousand cubic feet of gas to determine the gross income of the property for each year, and then severance taxes, ad valorem taxes and the operating expenses are deducted from the gross operting income to arrive at the net operating income; also any future capital expenditures are deducted from the gross income.

"And after determining the flow or the cash flow of net income by years, it is customary to discount future net income by years, using some discount factor which is usually based on the going rate of interest that a person would have to pay to borrow money, and this is called the discounted future net income, or sometimes called the present net worth of future net income.

"Then, after obtaining the present net worth of future net income, or discounted future net income, there are various methods of arriving at fair market value of the property from that figure.

"Some arbitrary fraction of that figure is usually taken as the fair market value, depending upon the needs or the financial position or the requirements of the purchaser. A property may be worth more to one purchaser than to another, depending on his ability to borrow money on this particular property or depending on the rate of return that he desires on his investment.

"Q. Mr. Jeffrey, you have given a quick summary of a very detailed analysis, I take it, inspection of histories, past financial data available to you, and the steps you take thereupon to make your evaluations, I anticipate that you leave out quite a number of factors, price per barrel of oil being determined by the gravity of the oil, the marketability of the oil of that particular lease, and its position within the field, and its access to pipelines?

"A. Yes. Of course, when a property is evaluated, it is usually known what the going price for crude or gas is in that particular field at that time. Sometimes it is customary or sometimes the evaluation engineer will take into consideration future escalations in the price of oil and gas, but ordinarily that is not done with oil. It's sometimes done with gas, where gas contracts provide for escalation in the price of gas in the future.[3]

"* * *

"Q. In performing your geologic and engineering functions of this appraisal, and outlining the steps of a formal evaluation and appraisal as you did to the jury, were these functions and each of these steps performed in the evaluation of these properties?

"A. Yes.

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3. Appendix, Vol. IV, pp. 1234 to 1237.

"Q. Now, generally, what were the general documentations of financial data, geologic reservoir information, well logs, related items with reference to your basis for the evaluation and appraisal, would you generally describe it?

"A. The production, past production performance of the various leases was obtained from State reports, reports which are filed by the operators of the leases with the state in which the leases are located. The electrical logs were obtained from the records of Wilcrof, Incorporated, and Irving Petroleum Investment, Incorporated.

"All data as to core analyses and well records were obtained from the records of Wilcrof, Incorporated and Irving Petroleum Investment.

"Data as to the price of oil and gas was obtained from pipeline run statements which are in the records of the two companies.

"Data as to the operating costs during the year 1966 were obtained from actual operating statements which were in the possession of Wilcrof, Incorporated and Irving Petroleum Investment.

"Q. And based on these various records that you have just outlined before the Jury, were subsequent calculations needed by you to arrive at your opinion?

"A. Yes.

"Q. And were these calculations performed on the data that came from these records you have just named?

"A. Yes.

"Q. And this is an opinion that you have expressed in your evaluation appraisal, is it not?

"A. Yes."[4]

4. Appendix, Vol. IV, pp. 1241, 1242.

Thus the factual bases used by Jeffrey in preparing his estimates came from reports filed by the operators of the leases as to the past production performance of the various leases and from the records of the two companies as to the electrical logs, core analyses, well records, prices of oil and gas, and operating costs.

We held that Williams was denied his constitutional right to confront and cross-examine the witnesses who prepared and were the custodians of the records on which Jeffrey relied. Among other hurdles to be surmounted before Jeffrey's estimates of value might become admissible, we pointed out that, "[t]here was no proof that the records on which the witness relied were made and kept in such fashion as to meet the requirements of the Federal Business Records Act, 28 U.S.C. §1732."[5]

Nonetheless, the Government insists that Jeffrey's expert opinion of value as to each of the properties was properly admitted, arguing:

> "(A) It is submitted that this test is here misapplied and that the proper test under the circumstances is not whether the records themselves qualify for admission under an exception to the hearsay rule, but whether the records are such as are ordinarily consulted and relied upon under the practices, usages, and standards of the appraisal profession in like

5. We would call attention also that the production reports filed with the state by the operators of the leases do not qualify for admission under the official records statute, 28 U.S.C. §1733:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

That much is conclusively demonstrated by the rationale of Matthews v. United States, 5 Cir, 1954, 217 F.2d 409.

> cases. (B) To impose a general requirement upon an expert witness that he consult only such sources as themselves would be admissible under the rules of evidence and particularly without violating the hearsay rule would go far to excluding all expert opinion from criminal trials. In particular, it would wreak havoc with medical and psychiatric testimony which plays a large and doubtless an increasing role in present-day criminal practice." [Gov't's petition for rehearing, p. 2.]

[The references (A) and (B) have been inserted to facilitate ready reference.]

In thus proceeding from (A) to (B) the Government has indeed made "one giant leap," for, whatever might be the merits or demerits of such a holding, the present decision does not impose any "general requirement" as to the sources which may be consulted by an expert witness. The Government's contention on this score has caused us in the foregoing part of this opinion to extend at some length our references to the record so that there may be no misunderstanding as to what is here decided.

Actually our decision fits neatly into what the Government itself contends to be a correct statement of the law:

> "If the witness has gone to only one hearsay source and seeks merely to summarize the content of that source, then he is acting as a summary witness, not an expert. Since he is introducing the content of the extra-judicial statements or writings to prove truth, his testimony, like its source, is hearsay and is inadmissible unless the source qualifies under an exception to the hearsay rule. When, however, the witness has gone to many sources—although some or

> all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise."
>
> [Gov't's petition for rehearing, pp. 3-4][6]

The record shows that Jeffrey went to only one hearsay source for the past production performance of the various leases, namely the reports filed with the state by the operators, and to only one hearsay source for the electrical logs, core analyses, well records, prices of oil and gas, and operating costs, namely the records of the two companies. The fact that his testimony was admitted in the form of an expert's opinion does not by some magical legerdemain remove the stigma of inadmissible hearsay with which its source was infected.

Thus we do not think that the Government has successfully met the objection to Jeffrey's testimony as hearsay. Assuming, arguendo, that it has done so, we think that the Government is clearly in error when it argues that there are no "different and more stringent requirements of admissibility upon expert opinion evidence in criminal cases than apply in civil cases," and that the right of confrontation is no different or more far-reaching than the

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6. In support of this claimed distinction, the Government discusses the folowing authorities: 3 Wigmore on Evidence, 3rd ed. p. 52; Standard Oil of California v. Moore, 9 Cir. 1957, 251 F.2d 188; Hannan v. United States, D.C. Cir. 1942, 131 F.2d 441; H. & H. Supply Co. v. United States, 10 Cir. 1952, 194 F.2d 553; Hammond Lumber Co. v. Los Angeles County, 1930, 285 P. 896; Johnson v. Lowell, 1922, 240 Mass. 546. It is not our purpose to rule upon whether the quoted statement is an entirely correct statement of the law. However, we do agree in substance with the first two sentences.

hearsay rule (Government's suggestion for rehearing en banc, p. 2). To support that thesis the Government lifts out of context a part of the opinion in *Matthews v. United States, supra* (Government's Petition for Rehearing, p. 3):

> "It has uniformly been held that [the right of confrontation] may not be invoked to exclude evidence otherwise admissible under well-established exceptions to the hearsay rule, and undoubtedly Wigmore is correct in saying, with respect to the Constitutional right to confrontation, 5 Wigmore, Evidence, §1397:
>
> > "'The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.'"

217 F.2d at 418.

That quotation was not necessary to the decision in *Matthews*. It overlooked the much earlier opinion in *Mattox v. United States*, 1895, 156 U.S. 237, 242, 243, where the Supreme Court stated:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, *not only* of testing the recollection and sifting the conscience of the witness, *but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*" (Emphasis added.)

Since the date of our decision in *Matthews, supra,* the Supreme Court has held that, "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page,* 1968, 390 U.S. 719, 725. Again, as recently as June 23, 1970, the Court said:

> "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more nor less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See Barber v. Page, 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968); Pointer v. Texas, 380 U.S. 400; 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965)."

California v. Green, 1970, ___ U.S. ___, 26 L.Ed.2d 489, 495.

The opinion in *Green* puts beyond doubt that the purposes of confrontation, while they include the right of cross-examination, extend beyond that right:

> "Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery

> of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."

___ U.S. at ___, 26 L.Ed.2d at 497.

We adhere to the holding that Williams was denied his constitutional right to confront and cross-examine in the presence of the trial jury the witnesses who prepared and were the custodians of the records on which Jeffrey relied.

II. The Erroneous Admission of Jeffrey's Testimony Requires that Williams' Conviction be Reversed in Toto.

Jeffrey testified, over Williams' objection, to the amounts of his estimates of the future net earnings of the Irving and the Wilcrof oil and gas properties as of January 1, 1967. The indictment as returned by the grand jury contained twenty counts (App. 13-37), the last five of which did not mention Williams but named, as defendants, Ernest M. Hall, Jr. and Fred L. Hall. Counts 4 and 5 were dismissed. Williams was arraigned and pleaded not guilty to Counts 1 through 3 and 6 through 15 (App. 2). Count 1 charged Williams and three codefendants with conspiracy. Counts 2 and 3 and 6 through 15 charged Williams with substantive violations of the mail fraud statute. He was tried and convicted on those 13 counts. A reexamination of those counts convinces us that each contained allegations as to which evidence was relevant to prove the net future earnings as of January 1, 1967 of the producing oil and gas properties in question. Indeed that was the position taken by Williams in his brief on

original hearing (pp. 8 and 9),[7] and the Government had not controverted that position prior to its petition for rehearing. We conclude that Jeffrey's testimony related to allegations in the main body of each of the thirteen counts on which Williams was convicted.

The Government's petition for rehearing in Case No. 26829 is therefore denied.

No. 26830

We affirmed the judgment of conviction in No. 26830.[8] The record in that case approaches the ultimate in brevity. It consists of a single count criminal information filed by the United States Attorney (App. 53-59), six one-line special pleas quoted in footnote 12 to our original opinion (App. 60), and a brief stipulation signed by the United States Attorney, the defendant Williams, and Williams' attorney (Appendix A to the Government's Answer to Williams' motion for rehearing). By that stipulation the parties agreed:

> "1. That all of the facts alleged in the attached Criminal Information (being styled United States of America vs. James W. Williams, Criminal No. 68-H-233), which said information is incorporated herein by reference, are true and correct, and that upon this Stipulation the Court may find that all such facts are conclusively proved beyond a reasonable doubt and are binding on the parties hereto and that the Court may find the defendant JAMES W. WILLIAMS guilty as charged without further evidence.

7. Allegations charged in Count 2 were adopted by reference in subsequent counts.

8. Referred to in our original opinion as Case No. 233, see footnote 3 to original opinion.

"2. That the defendant, JAMES W. WILLIAMS, desires to present no additional evidence other than this stipulation on his plea of not guilty to the offense charged in said Criminal Information.

"3. All motions filed heretofore by JAMES W. WILLIAMS in criminal causes numbered 68-H-15 and 68-H-25, shall apply as if filed in the above captioned and numbered cause and the rulings of the Court shall be the same and apply herein. Defendant does not waive his pleas in bar.".

Admittedly, No. 26829 (mail frauds and conspiracy to defraud) and No. 26830 (conspiracy to unlawfully manipulate the price of Westec stock) each had its genesis in the collapse of Westec. However, they involved different crimes, different facts, and required different evidence for conviction. Former jeopardy, therefore, did not bar Williams' prosecution in No. 26830. *Blockburger v. United States,* 1932, 284 U.S. 299, 304; *United States v. Ewell,* 1966, 383 U.S. 116, 125. That would be true even under the views expressed in Mr. Justice Brennan's separate opinion in *Abbate v. United States,* 1959, 359 U.S. 187, 196-201, for the two prosecutions here involved are not parts of a single transaction but are for different acts. Likewise, Williams can take no comfort from Mr. Justice Brennan's concurring opinion in *Ashe v. Swenson,* 1970, 397 U.S. 436, 448-460; *see also Waller v. Florida,* 1970, 397 U.S. 387.

In *Petite v. United States,* 1960, 361 U.S. 529, and *Marakar v. United States,* 1962, 370 U.S. 723, judgments of conviction were vacated when the Court granted the Government's motions made "on the ground that it is the general policy of the Federal Government 'that several

offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.'" 361 U S. at 530. The Government insists that that policy involves the exercise of executive discretion not subject to judicial review and, in any event, that the policy is not applicable. Under the facts and circumstances of these cases, we conclude that the policy has not been violated, and certainly not in such manner as to deny Williams the equal protection of the law or due process of law.

The petition for rehearing in No. 26830 is therefore denied as is also the petition for rehearing in No. 26829.

PETITIONS DENIED.

APPENDAGE C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26829 and 26830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES W. WILLIAMS,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(September 16, 1971)

Before BROWN, Chief Judge, and RIVES, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM, and RONEY, Circuit Judges.

MORGAN, Circuit Judge: This case raises an important question concerning the admissibility of expert witness testimony in criminal prosecutions. Because of the importance of the issue, we have placed this appeal

en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

James W. Williams, formerly Chairman of the Board of Westec Corporation, was convicted of conspiracy to violate 15 U.S.C. §§ 77e(a), 78ff(a) and 18 U.S.C. §§ 1001, 1341, and also of twelve substantive violations of the mail fraud statute, 18 U.S.C. § 1341, after a jury trial in the United States District Court for the Southern District of Texas.[1] These criminal charges against Williams grew out of the financial collapse of Westec Corporation.[2]

The indictment against Williams alleged, in part, that he had caused Westec to sell oil and gas properties to corporations controlled by conspirators at prices greater than their fair market value. In support of these allegations, the Government called the witness Thomas Jeffrey to testify as an expert concerning the value of the properties involved.

Williams objected to the admission of Jeffrey's testimony because it was based upon an investigation of

1. Williams was sentenced to a total of ten years' imprisonment, five years for the conspiracy, and consecutive five-year terms on the substantive counts, to run concurrently with each other. Subsequently, Williams was tried and convicted of a separate charge of conspiracy to unlawfully manipulate the price of Westec's common stock, in violation of 15 U.S.C. §§78i(a)(1) and (2). For this conviction, Williams was sentenced to an additional five years' imprisonment to run consecutively to the sentences imposed for the mail fraud violations.

2. Westec's stock was suspended from trading on the American Stock Exchange on August 26, 1966. Shortly thereafter, the United States Securities and Exchange Commission began an investigation of Westec's affairs. On September 27, 1966, the United States District Court for the Southern District of Texas entered an order placing the corporation in reorganization proceedings.

documents and business records not themselves introduced in evidence. On appeal, a panel of this court accepted this argument and reversed the conviction, holding that "Williams was denied his constitutional right to confront and cross-examine the witnesses who prepared and were the custodians of the records on which Jeffrey relied". *Williams v. United States,* 5 Cir., 1970, 424 F.2d 344.[3] Subsequently, the Government filed a timely petition for rehearing and a suggestion for rehearing en banc. The panel denied the petition for rehearing with a per curiam opinion which further elaborated the basis for its ruling. *United States v. Williams,* 5 Cir., 1970, 431 F.2d 1168. On the same date, the full Court granted the Government's petition for rehearing en banc on briefs without oral argument (431 F.2d 1175). We hold that the original panel of this court erred in reversing the conviction. The decision of the panel is overruled and the decision of the District Court is in all respects affirmed.

The admission of expert witness testimony based upon records not themselves introduced in evidence potentially raises questions with respect both to the constitutional right of confrontation and to the appropriate federal hearsay rule. Prior to the recent Supreme Court opinion in *California v. Green,* 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970), it was thought by some commentators that the Sixth Amendment confrontation clause served to constitutionalize the common law hearsay rule; that the protection afforded by the confrontation clause was identical to that afforded by the hearsay rule and subject to the

3. The original panel of this court properly affirmed the District Court with respect to the other arguments made by Williams on appeal. This en banc rehearing is confined solely to the issue of the admissibility of Jeffrey's testimony.

same exceptions.[4] *Green*, however, clarified the relationship between these two guarantees, making it clear that the right of confrontation and the rule against hearsay present two distinct, albeit related questions. Mr. Justice White, writing for the court, noted that:

> While it may readily be conceded that hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence . . .
>
> 399 U.S. 149, 155, 26 L.Ed.2d 489, 495.

In terms of the reliability of evidence, the confrontation clause merely establishes a constitutional minimum as to the character of criminal proceedings.[5] Evidence may be constitutionally admissible under the confrontation clause and still run afoul of the appropriate federal hearsay rule.[6]

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4. See *e.g.* V Wigmore on Evidence §1397 (3d ed. 1940). Speculation as to the constitutional status of the hearsay rule was fueled by the Supreme Court's decision in *Pointer v. Texas*, 380 U.S. 400 (1965), in which the court read into the Fourteenth Amendment the confrontation clause of the Sixth Amendment, while making no attempt to distinguish that clause from the rule against hearsay. See *generally*, Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966); Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. Rev. 366 (1966).

5. The confrontation clause serves other interests in addition to the assurance of evidentiary reliability. It also, for example, protects the right to be present at trial when incriminating evidence is introduced and the right to have the trier of fact observe the demeanor of witnesses. See, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 108-17 (1970).

6. In *Green*, the court observed that "merely because the evidence is admitted in violation of a long-established hearsay rule does not

Hence, while the original panel of this court based its decision principally upon the confrontation clause, we find it necessary to consider separately whether Jeffrey's testimony violated the confrontation clause or the hearsay rule. First, however, we shall describe in greater detail the testimony of the expert witness Jeffrey.

I. *Jeffrey's Testimony*

The testimony of Jeffrey concerned the value of two producing oil and gas properties known as the Irving properties and the Wilcrof properties. Jeffrey was an independent consulting petroleum engineer. In his testimony Jeffrey described his professional background and then explained the procedures employed in appraising the value of oil and gas properties. This testimony is quoted at length in the panel's per curiam opinion overruling the petitions for rehearing and will not be reproduced here.

Jeffrey testified that, on the basis of the appraisal procedures which he had described, he estimated the value of the Irving property to have been slightly less than $500,000 and the value of the Wilcrof property to have been approximately $44,469. In reaching these estimates, Jeffrey made a personal inspection of the properties and consulted the following sources of information: (a) the past production performance of the leases obtained from reports which are filed by the operators of the leases with the State, (b) core analyses data and well records obtained from the records of the two companies, (c) data as to the price of oil and gas obtained from pipeline run statements in the records of the two companies, and (d)

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lead to the conclusion that confrontation rights have been denied". 399 U.S. at 156, 26 L.Ed.2d at 495-96.

data as to operating costs for the year 1966 from the billing records from the operators of the leases.

Williams repeatedly objected to the admission of this expert testimony because the records of the two corporations upon which Jeffrey based his opinion were not themselves offered in evidence. The district judge overruled these objections and permitted Jeffrey to give his opinions as to the value of the properties. At the end of the direct examination, the Government offered into evidence the two appraisal reports, marked Government Exhibit X4 and X5, which Jeffrey had prepared. Defense counsel objected that the exhibits were hearsay and the court upheld the objection excluding the reports. Jeffrey was then cross-examined at length by the defense. During cross-examination, numerous factors which might reduce the weight of Jeffrey's expert opinion were developed, including the sources of information upon which he had relied.

II. *The Confrontation Clause*

The first question before the court is whether the admission of Jeffrey's expert witness testimony violated Williams' Sixth Amendment right of confrontation. In its per curiam opinion denying the motion for rehearing, the original panel of this court relied on *California v. Green,* supra, to support its decision that the admission of Jeffrey's testimony violated the confrontation clause. This reliance by the panel on *Green* was misconceived. Indeed, Green makes it clear that there is no Sixth Amendment obstacle to the admission of Jeffrey's testimony.

In *Green,* the Supreme Court held that the admission of the prior inconsistent statement of a witness as substantive evidence in a criminal case did not violate the confrontation rights of the accused so long as the wit-

ness was present at trial and available for cross-examination. The relevance of *Green* to the case at bar is that it represents the most recent effort by the Court to elaborate the nature of the right of confrontation. In its opinion, the Court observed that:

> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause . . .
>
> 399 U.S. at 157, 26 L.Ed 2d at 496.

In support of this statement, the Court quoted with approval from *Mattox v. United States,* 156 U.S. 237, 242-43, 39 L.Ed. 409, 411, 15 S.Ct. 337 (1895):

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief . . .

Green, then, makes it clear that the confrontation guarantee focuses upon "the right of the accused to confront and probe each of his accusers — a narrow adversary activity".[7]

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7. The Supreme Court, 1969 Term, 84 Harv. L. Rev. 108, 112 (1970).

Given this view of the confrontation clause, it is evident that the admission of Jeffrey's testimony did not violate that guarantee. Jeffrey was personally available for cross-examination by the appellant. There was ample opportunity for the defense to probe the authenticity and accuracy of the sources relied upon by Jeffrey and the reasoning processes by which he arrived at his valuation. In light of the reasoning of *Green,* we conclude that Jeffrey's presence at the trial and his availability for cross-examination satisfied the constitutional right of confrontation regardless of whether his testimony fell within one of the traditional exceptions to the hearsay rule. Had the Government attempted to introduce the appraisal reports in evidence without calling the expert who had prepared them and offering an opportunity for cross-examination, then Williams' right of confrontation would have been infringed, but this is not the case at bar.

Indeed, the intensity of the cross-examination which the witness Jeffrey actually received suggests that Williams' right of confrontation was fully protected. Counsel for the defense elicited from Jeffrey several statements that could be viewed as reducing the weight of his testimony. For example, Jeffrey acknowledged that he could not be absolutely certain that the records he examined were correct. He further testified that he had not himself surveyed the land and that he could not be sure that the surveys which he examined were correct. Jeffrey testified that he had done what is customary in his profession with regard to verifying and accepting the various reports of the two companies which he had used in his valuation of the properties.

III. *The Federal Hearsay Rule*

Having established that there is no constitutional impediment to the introduction of Jeffrey's testimony, there still remains the question of whether the expert testimony violated the applicable federal hearsay rule. We conclude that it did not.

Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources. *United States v. Alker*, 3 Cir., 1958, 260 F.2d 135; *Birdsell v. United States*, 5 Cir., 1965, 346 F.2d 775, 779-80, cert. den. 382 U.S. 963; *Brown v. United States*, D.C. Cir., 1966, 375 F.2d 310, 318; *H & H Supply Co. v. United States*, 10 Cir., 1952, 194 F.2d 553. The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion.[8] Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.

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8. Cf., C. McCormick, *Handbook of the Law of Evidence* §15 (1954); Rheingold, *The Basis of Medical Testimony*, 15 Vand. L. Rev. 473, 489 (1962).

This rule of law was most recently stated in the Fifth Circuit in *Birdsell v. United States*, supra. This was a criminal prosecution in which the state offered the testimony of a psychiatrist which was based upon a personal interview with the patient and upon a study of hospital records and psychological tests performed by other physicians. The defense argued that the testimony was inadmissible because the records on which the testimony was based were inadmissible under the Business Records Act, 28 U.S.C. 1732. The Fifth Circuit rejected this argument, holding that:

> . . . there is abundant authority that an expert witness who is available for cross-examination at the trial may use such records as the basis for an opinion without the proponent having to call every person who made a recorded observation.
>
> 346 F.2d at 779.

This case firmly established the principle, which we reiterate here today, that an expert's testimony need not be based solely upon records which are themselves introduced in evidence so long as the sources of information are of a type reasonably relied on by experts in forming opinions or inferences upon the subject.

In *H & H Supply Co. v. United States*, supra, the Tenth Circuit permitted the admission of expert witness testimony on facts that are strikingly similar to the case at bar. This was a condemnation case involving the value of certain oil leases. The Government called two professional petroleum engineers to give their expert opinion as to the value of the oil leases. Like Jeffrey in the case at bar, these petroleum engineers consulted hearsay

sources in formulating their opinions. These included not only an examination of the claimant's books and records but also an on-the-scene examination of the property, a geological study of the land in question and of nearby land, conversations with employees of the claimant, an examination of records of the Osage Indian Agency, examination of records of companies owning adjacent oil leases, etc. Over objections that the testimony was hearsay, the court admitted the evidence, observing:

> The testimony of the petroleum engineers with respect to the sources of their information was not offered for the purpose of establishing the truth of the information received by them. They were testifying as valuation experts and the sole purpose of this testimony was to establish the sources upon which they relied in reaching their conclusions as to values . . .
>
> 194 F.2d 553, 555.

Appellant asserts that this case and other civil cases are inapposite because this is a criminal prosecution. This argument is mistaken. While it is true that the confrontation clause has applicability only in criminal cases, the same cannot be said for the hearsay rule. The rule against hearsay has as its purpose the assurance of evidentiary reliability. This purpose is equally served in civil as well as criminal cases. We know of no authority for the general proposition that a more stringent hearsay rule must be applied in criminal than in civil cases. The Constitution protects the defendant in criminal prosecutions through the confrontation clause and the presumption of innocence. These are in no way

undermined by applying the same hearsay standards in criminal as in civil cases.

The federal hearsay rule to which we adhere in this case is the same as that adopted in the *Proposed Rules of Evidence for the United States District Courts and Magistrates* (1969) by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The proposed rules provide as follows:

> *Rule 7-03 Opinion Testimony by Experts.*
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied on by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Advisory Committee's Notes state that this rule contemplates the "presentation of data to the expert outside of court". The proposed rules are drafted to apply equally in criminal as well as civil cases [9]

Applying these principles to the case at bar, we can only conclude that the trial judge properly admitted Jeffrey's testimony. Jeffrey's credentials as an expert were never assailed. Nowhere has it been argued that the records consulted by Jeffrey were other than of the type customarily relied on by experts in valuing oil properties. Jeffrey so testified and this testimony was never challenged.

Appellant argues that Jeffrey was not a true expert witness, but rather was a "summary" witness who merely

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9. For a useful discussion of proposed Rule 7-03, see Green, *Highlights of the Proposed Federal Rules of Evidence*, 4 Ga. L. Rev. 1, 33-34 (1969).

summarized the contents of the records of the corporations. Appellant contends that the testimony of a summary witness is admissible only if the original records which the witness is summarizing are themselves introduced in evidence. Cf. *McDaniel v. United States*, 5 Cir., 1965, 343 F.2d 785; *Greenhill v. United States*, 5 Cir., 1962, 298 F.2d 405.

However, we need not reach the question of whether a summary witness must first introduce the records on which he bases his testimony because it is clear that Jeffrey was not such a summary witness. A reading of Jeffrey's testimony indicates that it involved far more than a mere summation of the records of the two corporations. Jeffrey testified that his initial step in appraising the two properties was the gathering of all available information. He inspected the properties and the equipment, and talked to the operating personnel of the leases. He obtained and examined electrical logs, core analyses and well records of the two corporations. He acquired the past production performance of the various leases from State reports. Billing records from the operators of the leases were examined to determine production costs. Oil and gas prices were established from pipeline run statements.

Having consulted all of these variegated sources, Jeffrey then applied the concepts derived from his professional experience to reach an opinion as to value. He projected the future gross income of the leases using estimated rates of production and the selling price of oil and gas, and then adjusted this figure to net income by deducting estimated expenses, taxes, and capital expenditures. The estimated future net income was then discounted to ascertain its present value. Following customary practice, Jeffrey

then selected an "arbitrary" fraction of the present value of the future net income as representing the fair market value of the leases. Jeffrey testified that this arbitrary fraction was based upon the needs and financial position of the purchaser. The application of these concepts to produce an expert opinion as to value involved far more than the mere recapitulation of the contents of records. On the contrary, Jeffrey consulted many sources, and then formed an independent judgment which reflected his skill and knowledge as an expert.

Were we to accept the evidentiary rule advanced by the appellant and accepted by the original panel of this court, we would create a serious barrier to the use of expert testimony in the federal courts. The same logic which would bar Jeffrey from consulting the core analyses, electric logs and well records of the two companies would equally bar a physician from relying upon lab reports and the like unless the technician who conducted the test was also produced. Similarly, a real estate expert would be barred from testifying as to the value of real property unless he proved in court the transactions on which he based his expert judgment. We think that such an evidentiary rule would be unwise. As previously noted, the modern trend, as reflected in the Proposed Rules of Evidence for the district courts is towards eliminating such restrictions on expert testimony.

For the foregoing reasons, we reverse the decision of the panel of this court on the issue of the admisibility of Jeffrey's testimony. The judgment of the district court is in all respects affirmed.

AFFIRMED.

RIVES, Circuit Judge, dissenting, with whom Judges GOLDBERG and GODBOLD join:.

I respectfully dissent for the reasons expressed in the panel's original opinion reported in 424 F.2d 344, and its opinion denying the petitions for rehearing, reported in 431 F.2d 1168.

APPENDAGE D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

Nos. 26829 and 26830

D. C. Docket Nos. CR 68-H-107 &
CR 68-H-233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES W. WILLIAMS,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

Before BROWN, Chief Judge, and RIVES, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM, and RONEY, Circuit Judges.

JUDGMENT ON PETITION FOR REHEARING EN BANC

This cause came on to be heard on defendant-appellant's petition for rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the opinions and judgments of the panel of this Court of March 26, 1970 are hereby withdrawn; and that this cause in all respects be, and the same is hereby, affirmed.

September 16, 1971

RIVES, Circuit Judge, dissenting with whom Judges GOLDBERG and GODBOLD join:

Issued As Mandate:

APPENDAGE E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 26829 and 26830

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES W. WILLIAMS,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(November 4, 1971)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, and RIVES, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM, and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered causes be and the same is hereby DENIED.

Judges Rives, Goldberg and Godbold dissent from the denial of the petition for rehearing.